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IN THE
COURT OF APPEALS OF INDIANA

NATHAN A. POEHLEIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 62A05-0502-CR-107
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable James A. McEntarfer, Judge
Cause No. 62C01-0401-FA-78

August 24, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Nathan A. Poehlein ("Poehlein") appeals his convictions for three counts of possession of chemical reagents or precursors with the intent to manufacture controlled substances as Class D felonies,[1] one count of possession of methamphetamine as a Class D felony,[2] one count of possession of marijuana as a Class A misdemeanor,[3] one count of possession of paraphernalia as a Class A misdemeanor,[4] and one count of dealing in methamphetamine as a Class B felony.[5] Poehlein also challenges his aggregate fifty-three-year sentence. We affirm.

Issues

Poehlein raises three issues on appeal, which we restate as:

I. Whether the trial court abused its discretion by admitting certain evidence at trial, in violation of the Fourth Amendment to the United States Constitution;[6]

II. Whether the evidence is sufficient to support his seven convictions; and

III. Whether the trial court erred by imposing the fifty-three-year sentence.

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[1] Ind. Code § 35-48-4-14.5.

[2] Ind. Code § 35-48-4-6.

[3] Ind. Code § 35-48-4-11.

[4] Ind. Code § 35-48-4-8.3.

[5] Ind. Code § 35-48-4-1.

[6] In his appellant's brief, Poehlein also cites to a violation of Article 1, Section 11 of the Indiana Constitution, but develops no state constitutional argument separate from federal law. Therefore, we apply only the Fourth Amendment search and seizure law in the instant case. See Cheever-Ortiz v. State, 825 N.E.2d 867, 873 (Ind. Ct. App. 2005); see also Crabtree v. State, 762 N.E.2d 217, 220 (Ind. Ct. App. 2002).

Facts and Procedural History

On January 22, 2004, at an oral probable cause hearing, Indiana State Police Trooper Kirby W. Stailey ("Trooper Stailey") testified that, at approximately 10:00 a.m. that morning, Confidential Informant Number 5706 ("Informant") had advised him that she was present at the residence of Kenny Page ("Page") on the evening of January 21, 2004. While there, the Informant observed methamphetamine, marijuana, and used coffee filters with a "yellowish stain to them," which "would have been used in the manufactur[e] of methamphetamine." Appellant's App. at 195. The Informant also witnessed Page give one gram of methamphetamine to an unidentified female, in exchange for money. In addition, the Informant reported that, approximately two weeks earlier, she had observed red opium at Page's residence.

Trooper Stailey testified that this latter information was "consistent with information that [he] had received on September 29th, of [2003] from another confidential informant that there was red opium being dealt from the [Page] residence." Id. at 196. Trooper Stailey explained that he had been investigating Page for drug-related activity for the four-month period preceding the probable cause hearing. During the course of that investigation, the officer received information from other sources that drug activity was occurring at the Page residence.

With respect to the reliability of the Informant, Trooper Stailey testified that, although he had not previously worked with her, he had spoken to other officers who had received credible and reliable information from the Informant, which led "to the recovery of evidence

in the past." Id. at 195. Based upon his colleagues' reports, Trooper Stailey found the Informant to be credible. He also testified that, after interviewing the Informant personally, he believed her to be credible and reliable.

During the hearing, Trooper Stailey gave a very detailed description of Page's residence, as it appears from the outside, as well as driving directions to the residence. The officer requested a search warrant for the property, including any outbuildings or vehicles that might be located at the residence. At the conclusion of the hearing, the trial court concluded that probable cause existed to search Page's residence and, therefore, issued a search warrant.

On January 22, 2004, at approximately 4:50 p.m., Trooper Stailey and other officers executed the search warrant. Page, James Graham, and Page's two minor children were present during the search. While inside the residence, Trooper Stailey noticed a closed door on the left, which opened to a staircase. The officer asked Page if "there was anybody upstairs to be concerned about," to which Page responded that the upstairs "was rented, but nobody was up there." Tr. at 395. Trooper Stailey opened the door, proceeded up the stairs, and conducted a protective sweep of the upstairs "for [his] own safety." Id.

Trooper Stailey, next, questioned Page about the "situation upstairs." Id. at 397. Page informed the officer that Poehlein was renting the upstairs portion of the residence and explained that his family resided downstairs. Page also told the officer that, "everything upstairs belonged to [Poehlein]." Id. at 407.

Subsequently, Trooper Stailey, with his canine Brix,[7] searched the residence, including the upstairs portion of the house. In a bedroom upstairs, Brix detected an odor of narcotics "at the dresser drawer" and at the gun safe. Id. at 409. Trooper Stailey found a small wooden box on top of the gun safe, which contained a plastic bag of a green vegetable-like substance. Beside the box, the officer observed a stack of new coffee filters, two smoking devices, and three pieces of mail addressed to Poehlein, at his mother's address. Next, Trooper Stailey forcibly opened the locked gun safe and found a semiautomatic handgun, two magazines, a tin can containing over forty blister packs of Pseudoephedrine, a plastic bag of a green vegetable substance, and a coffee filter that contained a small amount of a "yellowish-white powdered substance," later determined to be .02 grams of methamphetamine. Id. at 411.

In the same upstairs bedroom, Trooper Stailey observed a large plastic container with a baby jar inside. The baby jar contained numerous wet coffee filters, which smelled like methamphetamine. The officer also discovered a burnt piece of aluminum foil atop the dresser, as well as "wadded up pieces of burnt aluminum foil throughout the bedroom."[8] Id. at 413.

After searching the upstairs portion of the residence, the officers searched the

[7] Brix is trained to detect five odors: marijuana, hashish, cocaine, methamphetamine, and heroin. Trooper Stailey testified that "when [Brix] goes through a room and he smells one of those five odors that he's trained to identify, he will provide a scratch response which tells [the officer] that he's detected that odor at that location." Tr. at 409.

[8] Trooper Stailey explained that the most common method to ingest methamphetamine is to fold a small piece of aluminum foil into a "boat" or "canoe," place the desired amount of methamphetamine on the foil, apply heat to the foil, and smoke the fumes through a "tooter" or makeshift pipe, i.e., pen tube, car antenna, or arrow shaft. Tr. at 413.

downstairs area and found methamphetamine in various locations. In the garage, the troopers came across numerous items used in the manufacture of methamphetamine, including cans of starter fluid—a source of ether, which is an organic solvent used in the extraction process of manufacturing methamphetamine—a tank containing anhydrous ammonia, lithium batteries, and pieces of aluminum foil with burnt residue. The officers also recovered some hydrochloric acid gas generators, which mix salt and sulfuric acid to produce hydrochloric acid gas. However, Poehlein's fingerprints were not found on any of these precursors.

On May 14, 2004, in a second amended information, the State charged Poehlein, in relevant part, with the following Counts: (I) conspiracy to commit dealing in methamphetamine as a Class A felony;[9] (II) possession of more than ten grams of Ephedrine or Pseudoephedrine as a Class D felony; (III) possession of chemical reagents or precursors, i.e., organic solvents, lithium metal, sulfuric acid, and hydrochloric acid, with intent to manufacture as a Class D felony; (IV) possession of chemical reagents or precursors, i.e., anhydrous ammonia or ammonia solution, with intent to manufacture as a Class D felony; (V) possession of methamphetamine as a Class C felony; (VI) possession of marijuana as a Class A misdemeanor; (VII) possession of paraphernalia, i.e., smoking devices and aluminum foil, as a Class A misdemeanor; and (VIII) dealing in methamphetamine as a Class A felony. The State also alleged that Poehlein was a habitual offender.

On April 29, 2004, Poehlein filed his first motion to suppress the evidence seized from the search of the Property. On June 15, 2004, after conducting a hearing, the trial court

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[9] Ind. Code §§ 35-48-4-1; 35-41-5-2.

denied Poehlein's motion to suppress. Thereafter, on June 29, 2004, Poehlein renewed his motion to suppress. On January 3, 2005, the trial court commenced Poehlein's four-day jury trial. The following day, Poehlein objected to the admission of certain evidence, which the trial court overruled, and filed his brief in support of his second motion to suppress.

At Poehlein's trial, Page testified that he classifies his house as one living unit but that Poehlein rented the upstairs, which contains three bedrooms and a non-working bathroom[10] and, further, that Page's family resides downstairs, which contains two bedrooms, one bathroom, a kitchen, and a living room. Poehlein was not prevented from accessing any part of Page's residence, including the garage. Page also testified that he and Poehlein had an agreement whereby Page would purchase most of the ingredients used in the manufacturing process and Poehlein would "cook" the methamphetamine in the garage. Poehlein and Page split the manufacturing proceeds 75% and 25%, respectively. In addition, Page testified that he typically smoked methamphetamine upstairs, while his two children were downstairs and that he and Poehlein smoked methamphetamine inside the residence. Page explained that methamphetamine and marijuana were Poehlein's two drugs of choice. Graham confirmed that he witnessed Page and Poehlein manufacture methamphetamine.

On January 6, 2005, at the conclusion of trial, the jury found Poehlein not guilty of Count I, guilty as charged on Counts II, III, IV, VI, and VII, and guilty of the lesser-included offenses of possessing marijuana as a Class D felony on Count V, and dealing in methamphetamine as a Class B felony on Count VIII. Subsequently, and at the conclusion of

the habitual offender phase of trial, the jury concluded that Poehlein was a habitual offender for committing the predicate offenses of theft as a Class D felony in 1990 and possession of chemical reagents or precursors with intent to manufacture methamphetamine as a Class D felony in 2001.

On January 6, 2005, the trial court entered judgments of conviction on the jury's guilty verdicts and found Poehlein to be a habitual offender. On January 13, 2005, Poehlein filed a motion to have a jury determine any aggravating or mitigating circumstances relevant to his sentencing, which the trial court denied. On February 3, 2005, after conducting a sentencing hearing to the bench, the trial court found the following aggravating circumstances: (1) Poehlein's criminal history; (2) the increased risk that Poehlein would commit another crime; (3) that he committed the present offenses while on probation for another crime; and (4) that anything less than an enhanced sentence would depreciate the seriousness of the criminal offenses. The trial court considered Poehlein's remorse as the sole mitigating circumstance. On balance, the trial court concluded that the aggravating factors outweighed the mitigator and sentenced Poehlein to the Indiana Department of correction for three maximum terms of three years each for the possession of chemical reagents or precursors with the intent to manufacture controlled substances convictions, to be served concurrently. The trial court also sentenced Poehlein to a term of eighteen months for the possession of methamphetamine conviction, to two terms of one year each for the possession of marijuana and methamphetamine convictions, and to the maximum term of

[10] At one point, Page testified that the upstairs portion of his residence contains one-and-one-half bathrooms. However, later, he testified that the bathroom upstairs was broken in January of 2004 and that Poehlein must

twenty years for the dealing in methamphetamine conviction, all to be served concurrent with each other. The trial court then imposed a thirty-year sentencing enhancement as a result of Poehlein's status as a habitual offender and ordered that the enhanced sentence be served consecutive to the combined twenty-year sentence. The trial court ordered Poehlein to serve the concurrent three-year sentence consecutive to the concurrent fifty-year sentence, for an aggregate sentence of fifty-three years. This appeal by Poehlein ensued.

Discussion and Decision

I. Motion to Suppress

A. Standard of Review

On appeal, Poehlein first argues that the trial court erred when it denied his motion to suppress evidence.[11] However, because Poehlein did not seek an interlocutory appeal after the denial of his motion to suppress, the issue presented is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. Washington v. State, 784 N.E.2d 584, 586-87 (Ind. Ct. App. 2003); but see Sellmer v. State, 842 N.E.2d 358, 365 (Ind. 2006) (reviewing the trial court's denial of the defendant's motion to suppress

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have used the bathroom downstairs while at the residence.

[11] The State argues that Poehlein does not have a legitimate expectation of privacy in Page's residence sufficient to challenge the probable cause, or lack thereof, supporting the search warrant in question. A person's Fourth Amendment rights against unreasonable search and seizure are personal. Minnesota v. Carter, 525 U.S. 83, 88 (1998). To challenge a search as unconstitutional under the Fourth Amendment, a defendant must have a legitimate expectation of privacy in the place that is searched. Id.

In the case at bar, the evidence demonstrates that Poehlein rented the upstairs portion of Page's residence and, while he stayed at his girlfriend's house several nights a week, he kept some of his personal belongings at the residence, including his clothes. Thus, Poehlein's status is more akin to an overnight guest in a home than one who is merely present with the consent of the householder. It is well settled that overnight guests may claim the protection of the Fourth Amendment and, therefore, we find the State's argument unpersuasive. Id. at 90.

after trial). A trial court has broad discretion in ruling on the admissibility of evidence. Bradshaw v. State, 759 N.E.2d 271, 273 (Ind. Ct. App. 2001). Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abused its discretion. Id. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Washington, 784 N.E.2d at 586.

B. Analysis

Poehlein maintains that the issuing magistrate did not have a substantial basis for concluding that the testimony of Trooper Stailey established probable cause under the Fourth Amendment to the United States Constitution. Specifically, Poehlein asserts that Trooper Stailey's testimony, which relied upon hearsay statements, failed to establish the Informant's credibility. He contends, further, that the totality of the circumstances did not corroborate the hearsay.

In determining whether to issue a search warrant, "'[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" Jaggers v. State, 687 N.E.2d 180, 181 (Ind. 1997) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983), reh'g denied). When reviewing a magistrate's decision to issue a warrant, the reviewing court applies a deferential standard. Newby v. State, 701 N.E.2d 593, 597 (Ind. Ct. App. 1998). We will affirm the magistrate's decision to issue the warrant if the magistrate had a "substantial basis" for concluding that probable cause to search existed. Jaggers, 687 N.E.2d at 181-82. "Substantial basis" requires us to

focus on whether the reasonable inferences drawn from the totality of the evidence support the probable cause determination. Id.

The United States Supreme Court has held that uncorroborated hearsay from a source whose credibility is itself unknown, standing alone, cannot support a finding of probable cause to issue a search warrant. Gates, 462 U.S. at 227. The federal test for ensuring the reliability of a hearsay statement in a probable cause determination allows the use of hearsay only if the totality of the circumstances corroborates the hearsay. Lloyd v. State, 677 N.E.2d 71, 74 (Ind. Ct. App. 1997) (citing Gates, 462 U.S. at 230-31). This constitutional principle is codified in Indiana Code Section 35-33-5-2(b), which delineates the information to be contained in an affidavit for a search warrant. See, e.g., State v. Spillers, 847 N.E.2d 949, 953-54 (Ind. 2006). Where a warrant is sought based upon hearsay information, the affidavit must either:

> (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or
>
> (2) contain information that establishes that the totality of the circumstances corroborates the hearsay.

Ind. Code § 35-33-5-2(b).

The trustworthiness of hearsay for purposes of providing probable cause can be established in a number of ways, including where: (1) the informant has given correct information in the past; (2) independent police investigation corroborates the informant's statements; (3) some basis for the informant's knowledge is demonstrated; or (4) the

informant predicts conduct or activities by the suspect that are not ordinarily easily predicted. Jaggers, 687 N.E.2d at 182. As our Supreme Court recently noted, however, these examples are not exclusive. See Spillers, 847 N.E.2d at 954. Rather, depending upon the facts, "other considerations may come into play in establishing the reliability of the informant or the hearsay." Jaggers, 687 N.E.2d at 182. One such additional consideration is whether the informant has made "[d]eclarations against penal interest." Spillers, 847 N.E.2d at 949, 954-55 (quoting Houser v. State, 678 N.E.2d 95, 100 (Ind. 1997)); see also Snover v. State, 837 N.E.2d 1042, 1048 (Ind. Ct. App. 2005).

To demonstrate credibility as a declaration against penal interest, an informant's statement must have "so far tended to subject the declarant to civil or criminal liability that a reasonable person in the declarant's position would not have made the statement." Newby, 701 N.E.2d at 599 (quoting Jervis v. State, 679 N.E.2d 875, 878 (Ind. 1997)). The reason that we find such statements to have credibility is that "[p]eople do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions." United States v. Harris, 403 U.S. 573, 583 (1971). This is especially true, as the Spillers Court observed, when the crime admitted by the declarant would likely have gone undetected. Spillers, 847 N.E.2d at 956.

Here, by advising Trooper Stailey of the drug-related activity occurring at Page's residence and, further, by informing him that she had observed red opium in the house just two weeks earlier, the Informant subjected herself to criminal liability for visiting a common nuisance. Indiana Code Section 35-48-4-13(a) provides: "A person who knowingly or

intentionally visits a building, structure, vehicle, or other place that is used by any person to unlawfully use a controlled substance commits visiting a common nuisance, a Class B misdemeanor." To convict a defendant of visiting a common nuisance, therefore, the State must prove that the defendant knew the building or structure that he or she visited was used for the unlawful use of a controlled substance. Traylor v. State, 817 N.E.2d 611, 620 (Ind. Ct. App. 2004), reh'g denied, trans. denied. Additionally, the State must prove that the building or structure the defendant visited was used multiple times for the unlawful use of a controlled substance. Id.

The Informant's statement about the red opium demonstrates her knowledge that Page's residence was being used for unlawful purposes, and the information regarding the events, which occurred on January 21, 2004, show that the Informant visited a building or structure that was being used by another to unlawfully use a controlled substance, i.e., a common nuisance.[12] Because the Informant implicated herself in a crime by revealing the present drug activity to Trooper Stailey, her statement was against her penal interest and demonstrated that she was a credible source of information. See, e.g., Houser, 678 N.E.2d 100 (finding an informant credible where he implicated himself in conspiracy to commit robbery with the defendant); Iddings v. State, 772 N.E.2d 1006, 1014 (Ind. Ct. App. 2002) (determining that an informant was credible when, while informing police that drugs could

[12] Moreover, inasmuch as the residence in question was being used as a drug-manufacturing lab, the evidence sufficiently proves that Page's residence was a common nuisance. See, e.g., Frye v. State, 757 N.E.2d 684, 691 (Ind. Ct. App. 2001) (holding evidence sufficient to support finding that house was a common nuisance where police found large quantity of drugs and drug paraphernalia lying around house, which suggested house was being used to unlawfully consume controlled substances), trans. denied, cert. denied, 535 U.S. 1103 (2002).

be found at the defendant's house, he implicated himself in the manufacture of methamphetamine with the defendant at the defendant's house), trans. denied.

Moreover, and apart from the penal interest, the Informant's information was corroborated by the totality of the circumstances. As set forth at the probable cause hearing, the record reveals that Trooper Stailey had been investigating Page for drug-related activity for the four-month period preceding January 22, 2004. During the course of that investigation, the officer received leads from other sources that drug activity was occurring at the residence at issue, including information on September 29, 2003, from another confidential informant that red opium was being distributed from the residence. This latter information corroborated the Informant's independent statement to Trooper Stailey that, approximately two weeks earlier, she had observed red opium at Page's residence.

Further, at the probable cause hearing, Trooper Stailey testified that, after interviewing the Informant personally, he believed her to be credible and reliable. He also stated that, while he had not previously worked with the Informant, he had spoken to other officers who had received credible and reliable information from her, which led to the recovery of evidence. Where participating officers seeking a search warrant collectively have probable cause, their individual knowledge can be imputed to the officer seeking the warrant. Cutter v. State, 646 N.E.2d 704, 713 (Ind. Ct. App. 1995), trans. denied. Giving significant deference to the judge who issued the search warrant, we conclude there was a substantial basis upon which to conclude that there was probable cause to believe methamphetamine and evidence of methamphetamine dealing and manufacturing might be recovered at Page's

residence. Accordingly, the trial court did not abuse its discretion by admitting the evidence seized from the residence at issue.[13]

II. Sufficiency of the Evidence

A. Standard of Review

Next, Poehlein asserts that the evidence is insufficient to sustain his multiple convictions. Our standard of review when considering the sufficiency of evidence is well settled. We will not reweigh the evidence or assess the credibility of witnesses. Robinson v. State, 699 N.E.2d 1146, 1148 (Ind. 1998). Rather, we will only consider the evidence most favorable to the judgment, together with all reasonable inferences that can be drawn therefrom. Id. We will uphold a conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Id.

[13] Poehlein also argues that, because he rented the upstairs portion of the residence, the police should have obtained a second search warrant before searching the upstairs bedrooms. It is true that a search of multiple units at a single address must be supported by probable cause to search each unit and is no different from a search of two or more separate houses. Figert v. State, 686 N.E.2d 827, 830 (Ind. 1997). However, an exception to the requirement of probable cause to search each unit at one address has been recognized where the units are under the common dominion or control of the target of the investigation or are used as a "collective dwelling." Id. In that situation, some decisions have held that probable cause to search one unit or part of the premises supports a search of the rest. Id.

Here, the evidence sufficiently demonstrates that the residence in question was under a collective occupation or control. Indeed, at the time of the probable cause hearing, Trooper Stailey had no indication that Page allowed Poehlein to rent the upstairs portion of the house. During the execution of the search warrant, Page informed Trooper Stailey that Poehlein resided upstairs; however, the door leading upstairs was unlocked and, therefore, the trooper conducted a protective sweep for purposes of officer safety. Moreover, Page testified that he classifies the house as one living unit and that the upstairs contains only three bedrooms and a non-working bathroom. The working bathrooms, kitchen, and living areas are all located downstairs. Accordingly, we do not believe that the officers erred by failing to obtain a separate warrant for the upstairs portion of the residence. Cf. United States v. Simpson, 944 F. Supp. 1396, 1409 (S.D. Ind. 1996) (noting that the "single unit" exception could not sustain warrant where officers failed to present evidence to the issuing magistrate showing that multiple units were being used as single unit).

B. Analysis

Poehlein maintains that the State presented insufficient evidence to sustain his convictions for three counts of possession of chemical reagents or precursors with the intent to manufacture controlled substances, one count of possession of methamphetamine, one count of possession of marijuana, one count of possession of paraphernalia, and one count of dealing in methamphetamine. We review the sufficiency of the evidence supporting this later conviction first.

To convict Poehlein of dealing in methamphetamine, a Class B felony, as a lesser-included offense of that charged in Count IX, the State had to demonstrate that he knowingly or intentionally manufactured less than three or more grams of methamphetamine.[14] See Appellant's App. at 186; see also Ind. Code § 35-48-4-1(a)(1). Here, the evidence most favorable to the judgment reveals that Page would purchase the ingredients required for the manufacturing process, i.e., the precursors, and Poehlein would manufacture the methamphetamine in the garage. For their illegal efforts, Poehlein and Page would split the manufacturing proceeds 75% and 25%, respectively. Indeed, Graham testified that he witnessed Page and Poehlein manufacture methamphetamine. The record further demonstrates that methamphetamine had recently been manufactured at the residence. This evidence is sufficient to sustain Poehlein's conviction for dealing in methamphetamine as a

[14] Indiana Code Section 35-48-1-18 defines "manufacture," in relevant part, as:

> [T]he production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

Class B felony.

We now turn to Poehlein's challenge to the sufficiency of the evidence supporting his six other convictions. In particular, Poehlein alleges that the State failed to prove that he either actually or constructively possessed any of the evidence found at the residence in question.

To convict Poehlein of possession of precursors or reagents, as charged in Count II, the State had to demonstrate that he: (1) possessed more than ten grams of Ephedrine or Pseudoephedrine; (2) with intent to manufacture methamphetamine. See Appellant's App. at 164; see also Ind. Code § 35-48-4-14.5(b). To obtain a conviction for possession of precursors or reagents, as charged in Count III, the State had to demonstrate that Poehlein: (1) possessed two or more chemical reagents or precursors, i.e., "organic solvents, lithium metal, sulfuric acid and hydrochloric acid;" (2) with intent to manufacture methamphetamine. See Appellant's App. at 168; see also Ind. Code § 35-48-4-14.5(e).

In addition, to convict Poehlein of possessing precursors or reagents, as charged in Count IV, the State had to demonstrate that he: (1) possessed anhydrous ammonia or ammonia solution; (2) with intent to manufacture methamphetamine. See Appellant's App. at 172; see also Ind. Code § 35-48-4-14.5(c). To obtain a conviction for possession of methamphetamine, a Class D felony, a lesser-included offense of that charged in Count V, the State had to show, beyond a reasonable doubt, that Poehlein knowingly or intentionally possessed less than three or more grams of methamphetamine. See Appellant's App. at 176; see also Ind. Code § 35-48-4-6(a). To convict Poehlein of possessing marijuana, as charged

in Count VI, the State had to demonstrate, beyond a reasonable doubt, that he knowingly or intentionally possessed less than thirty grams of marijuana. See Appellant's App. at 179; see also Ind. Code § 35-48-4-11. Finally, to obtain a conviction for possession of paraphernalia, as charged in Count VII, the State was required to prove that Poehlein: (1) possessed a raw material, instrument, device, or other object, i.e., "smoking devices and aluminum foil;" (2) that he intended to use for introducing a controlled substance into his body, or for enhancing the effect of a controlled substance, i.e., methamphetamine or marijuana. See Appellant's App. at 182; see also Ind. Code § 35-48-4-8.3.

In Bush v. State, 772 N.E.2d 1020, 1022-23 (Ind. Ct. App. 2002), trans. denied, another panel of this Court held that the State presented sufficient evidence to prove that the defendant knowingly or intentionally manufactured methamphetamine where police found several items used to manufacture methamphetamine at the defendant's residence. Here, Poehlein concedes that "[t]he police found evidence of a manufacturing setting in the garage," but argues that there "was no evidence of a methamphetamine lab in the upstairs portion of the residence that [he] rented." Appellant's Br. at 23. In response, the State maintains that the evidence presented at trial proved that Poehlein constructively possessed the chemical reagents or precursors and controlled substances. Accordingly, the dispositive question regarding six of Poehlein's convictions is whether the State presented sufficient evidence to prove that he constructively possessed the evidence recovered from the residence in question.

Constructive possession is established by showing that the defendant has both the

intent and capability to maintain dominion and control over the contraband. Person v. State, 661 N.E.2d 587, 590 (Ind. Ct. App. 1996), trans. denied. To prove the intent element, the State must demonstrate the defendant's knowledge of the presence of the contraband, which may be inferred from either the exclusive dominion and control over the premises containing the contraband or, if the control is non-exclusive—as is the case here—evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. Iddings, 772 N.E.2d at 1015. Among the recognized "additional circumstances" are: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the contraband; (5) contraband is in plain view; and (6) location of the contraband is in close proximity to items owned by the defendant. Floyd v. State, 791 N.E.2d 206, 210-11 (Ind. Ct. App. 2003), trans. denied. These circumstances apply to show constructive possession even where the defendant is only a visitor to the premises where the contraband is found. See Ledcke v. State, 260 Ind. 382, 387, 296 N.E.2d 412, 416 (1973); see also Collins v. State, 822 N.E.2d 214, 222 (Ind. Ct. App. 2005), trans. denied.

To establish the second element of constructive possession, i.e., the capability requirement, the State must show that the defendant is able to reduce the contraband to his or her personal possession. Proof of a possessory interest in the premises in which contraband is found is adequate to show the capability to maintain control and dominion over the items in question. See Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999); see also Iddings, 772 N.E.2d at 1015. Possession of contraband by the defendant need not be exclusive and can be

possessed jointly. Iddings, 772 N.E.2d at 1015.

In the present case, Poehlein did not have exclusive possession over Page's residence. However, the State presented evidence of additional circumstances that support an inference that Poehlein had knowledge of the presence of contraband. In particular, several of the State's witnesses testified at trial that the residence in question was being used as a methamphetamine lab and, thus, the State presented evidence of a drug manufacturing setting.[15] See, e.g., Floyd, 791 N.E.2d at 211. In addition, the precursors and controlled substances found upstairs were located in close proximity to items owned by Poehlein, including his mail and other personal belongings. Further, many of the items seized in the garage were in plain view of the officers during execution of the warrant.

Moreover, Poehlein's possessory interest in the residence—which was tantamount to a collective occupation or control by Page and Poehlein—is adequate to show his capability to maintain control and dominion over the items in question. See, e.g., Goliday, 708 N.E.2d at 6. What is more, here, as previously mentioned, the evidence reveals that Page and Poehlein were jointly engaged in the manufacture of methamphetamine and that Poehlein received 75% of the proceeds of that joint effort. In addition, the evidence demonstrates that Poehlein and Page smoked methamphetamine inside the residence. This evidence is sufficient to establish that Poehlein possessed the chemical precursors and controlled substances. The possibility that Poehlein may have jointly possessed these precursors and substances with

[15] It is irrelevant that the setting was found primarily in the garage. The evidence reveals that Poehlein had unfettered access to the entire residence, including the garage, even though he rented only a portion of the house. Moreover, the testimony of Page and Graham suggest that Poehlein manufactured the methamphetamine in the garage.

Page is irrelevant. See, e.g., Iddings, 772 N.E.2d at 1016.

III. Sentence

A. Standard of Review

Lastly, Poehlein contends that the trial court erred when it imposed his fifty-three-year sentence. In general, sentencing determinations are within the trial court's discretion. Cotto v. State, 829 N.E.2d 520, 523-24 (Ind. 2005) (citing Wooley v. State, 716 N.E.2d 919, 929 (Ind. 1999), reh'g denied). If the trial court relies upon aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. Wooley, 716 N.E.2d at 929.

B. Analysis

Poehlein asserts that the trial court erred by enhancing his sentences for the following convictions: (Counts II, III, and IV) possession of chemical reagents or precursors with the intent to manufacture as Class D felonies; and (Count VIII) dealing in methamphetamine as a Class B felony.[16] At the time of Poehlein's sentencing hearing, the Legislature had prescribed standard or "presumptive" sentences for each crime, allowing the sentencing court limited discretion to enhance a sentence to reflect aggravating circumstances or reduce it to

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[16] Poehlein also alleges that the trial court enhanced his sentence in Count V, for possession of methamphetamine as a Class D felony. However, the trial court imposed the then presumptive term of eighteen months for that conviction. See Ind. Code § 35-50-2-7 (2004) (providing that "A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2) years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances").

reflect mitigating circumstances. Indiana Code Section 35-50-2-5 provided, in part, that: "A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." In addition, Indiana Code Section 35-50-2-7 provided, in pertinent part, that "A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2) years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances."[17]

In the present case, the trial court enhanced Poehlein's sentence for dealing in methamphetamine from the presumptive term of ten years to the maximum term of twenty years and, further, enhanced his three possession of chemical reagents or precursors convictions from the presumptive term of eighteen months to the maximum term of three years. To support these enhancements, the trial court relied upon the following aggravating circumstances: (1) Poehlein's criminal history; (2) the increased risk that Poehlein would commit another crime; (3) that he committed the present offenses while on probation for another crime; and (4) that anything less than an enhanced sentence would depreciate the seriousness of the criminal offenses. Poehlein challenges the propriety of the latter three aggravators under Blakely v. Washington, 542 U.S. 296 (2004), reh'g denied. The State concedes that, without an admission by the defendant or a jury finding, the trial court's

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[17] Effective April of 2005, the Indiana Legislature amended Indiana's sentencing statutes, including Indiana Code Sections 35-50-2-5 and 35-50-2-7. In particular, the amendment eliminates presumptive sentences and

consideration of aggravating factors 2 and 4 was improper.

Turning to the third aggravator, i.e., that Poehlein committed the present offenses while on probation for another crime, we note that, recently, our Supreme Court addressed whether the fact that a defendant was on probation at the time of the offense needed to be proven to a jury before it could be considered in aggravation. Ryle v. State, 842 N.E.2d 320, 323-24 (Ind. 2005); see also Mitchell v. State, 844 N.E.2d 88, 92 (Ind. 2006). The Ryle Court held that because the "requirements governing probation officers and their presentation of information to the sentencing court ensure their work product's reliability," and because the documents they rely upon in creating presentence investigation reports are "judicial records" sufficient to pass constitutional muster, the fact that a defendant is on probation at the time of the offense is so closely related to the fact of prior conviction that it need not be submitted to a jury. Ryle, 842 N.E.2d at 324. The pre-sentence investigation report, which was discussed at trial but is not included in the record on appeal, clearly indicates that Poehlein was on probation at the time of the offenses in question, such that the trial court could properly consider this aggravator. See, e.g., Mitchell, 844 N.E.2d at 92.

The only question that remains is whether the permissible aggravators are sufficient to justify the imposition of the enhanced sentences. Poehlein's criminal history includes: (1) a 1989 misdemeanor conviction for operating while intoxicated; (2 and 3) two felony theft convictions in 1990; (4) a 1994 misdemeanor conviction for failing to fulfill duties following a collision with unattended vehicles or other property; (5) dealing in a schedule II controlled

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fixed terms in favor of an advisory sentencing scheme. We will examine the propriety of Poehlein's sentence under the former statute, which was in effect at the time of his sentence.

substance as a Class B felony; and (6) possession of chemical reagents or precursors. In addition, Poehlein became involved with the juvenile criminal justice system at the age of sixteen. This history, particularly his repeated drug-related offenses, when combined with his violation of probation, is sufficient to warrant the enhanced sentences. See, e.g., Mitchell, 844 N.E.2d at 92. This is true even considering remorse as a mitigating circumstance, which the trial court seemed to afford little weight.

For the foregoing reasons, we affirm Poehlein's convictions and fifty-three-year sentence.[18]

Affirmed.

CRONE, J., concurs.

KIRSCH, C.J., dissents with separate opinion.

[18] We note, sua sponte, that the trial court failed to specifically assign the habitual offender enhancement to one of Poehlein's five felony convictions. See, e.g., Carter v. State, 686 N.E.2d 834, 839 (Ind. 1997), reh'g denied; see also Chappel v. State, 591 N.E.2d 1011, 1012 (Ind. 1992), reh'g denied. In the event of simultaneous multiple felony convictions and a finding of habitual offender status, trial courts must impose the resulting penalty enhancement upon only one of the convictions and must specify the conviction to be so enhanced. Greer v. State, 680 N.E.2d 526, 527 (Ind. 1997). However, because the trial court imposed a sentencing enhancement of thirty years, as a result of Poehlein's status as a habitual offender, and, further, because Indiana Code Section 35-50-2-8(h) limits the habitual offender enhancement to not "more than three (3) times the [presumptive] sentence for the underlying offense," it is clear that Count VIII, i.e., Poehlein's only Class B felony conviction—a conviction that carries a "presumptive" sentence of ten years—is the underlying offense to which the thirty-year enhancement applies. As such, we decline to remand this cause to the trial court for further clarification regarding which of the five predicate felonies is being enhanced by virtue of the habitual offender finding. Cf. Miller v. State, 563 N.E.2d 578, 584 (Ind. 1990) (remanding for the trial court to assign the habitual offender enhancement to either the burglary or theft convictions), reh'g denied; see also Holbrook v. State, 556 N.E.2d 925, 926 (Ind. 1990) (seeing no utility in remanding the cause to the trial court for resentencing to apply the thirty-year enhancement to only one of the convictions, because concurrent sentences were imposed), reh'g denied.

IN THE
COURT OF APPEALS OF INDIANA

NATHAN A. POEHLEIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 62A05-0502-CR-107
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

KIRSCH, Chief Judge, *dissenting*.

I respectfully dissent.

To me, there was nothing presented to the issuing magistrate by which the credibility of the confidential informant could be established. We have only multiple levels of unsubstantiated hearsay statements. Although the majority concludes that the hearsay exception for statements against a penal interest makes the confidential informant credible, I believe the statement fails to do so. First, nothing in the statement says that the informant *knowingly* or *intentionally* visited the common nuisance, an essential element of the crime of visiting a common nuisance as a Class B misdemeanor. I.C. 35-48-4-13(a). Thus, the conclusion that it falls within the hearsay exception for statements against penal interest is

tenuous. Second, we have more than one level of hearsay. Third, we have no showing that the informant has provided correct information in the past. Fourth, we have no independent police investigation corroborating the informant's statements. While Trooper Stailey testified that the informant's information was corroborated by another informant, there is no showing that the other informant was credible and no information by which such credibility could be assessed. Finally, the officer's statement that he believed the informant to be credible is of no moment. It is for the magistrate to make an independent determination of credibility from the objective information provided.

Because I do not believe the totality of circumstances corroborates the multiple levels of unsubstantiated hearsay, I would reverse Poehlein's convictions.